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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DEBORAH COLBERT, Defendant and Appellant.	B291207 (Los Angeles County Super. Ct. No. BA456180)

APPEAL from orders of the Superior Court of Los Angeles County, Karla D. Kerlin, Judge. Affirmed.

Stephanie L. Gunther, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury conviction for vandalism, appellant Deborah Colbert was placed on probation and ordered to pay a $400 restitution fine and other court assessments. On appeal, appellant argues that her case should be remanded so the trial court can retroactively determine her eligibility for a pretrial mental health diversion program under Penal Code section 1001.36.[1] Appellant also argues that the trial court violated her due process rights by imposing the restitution fine and court assessments without making a finding as to her ability to pay. We conclude that section 1001.36 does not retroactively apply here, where appellant's case was "adjudicated" before the statute's enactment. Further, we conclude appellant forfeited any challenge to the restitution fine and court assessments by not raising her inability to pay in the trial court, as statutorily required. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning of April 5, 2017, Juan Salazar witnessed appellant repeatedly slamming a brick against Salazar's parked vehicle. The vehicle's windshield and window were broken, and there were dents and scratches to the body of the vehicle. The total damage to the vehicle was $4,455.

On May 4, 2017, the Los Angeles County District Attorney's Office charged appellant with vandalism resulting in more than $400 in damage (§ 594).

On June 26, 2017, defense counsel declared a doubt regarding appellant's competence. A forensic psychiatrist diagnosed appellant with "Unspecified Schizophrenia Spectrum

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[1] Further unspecified statutory citations are to the Penal Code.

and Other Psychotic Disorder with a Rule Out of Schizophrenia."[2] The trial court found appellant incompetent and suspended criminal proceedings. On December 18, 2017, the trial court reinstated criminal proceedings after finding that appellant had been restored to competence.

A jury convicted appellant of the charged offense on April 5, 2018.

On May 30, 2018, the trial court suspended the imposition of sentence and placed appellant on three years of probation through the Office of Diversion and Reentry. The court ordered appellant to serve 736 days in jail as a condition of probation, and awarded her a total of 736 days of presentence credit. The court also ordered that she pay $4,500 in victim restitution, a $400 restitution fine (§ 1202.4), a $30 court facilities assessment (Gov. Code, § 70373), a $40 court operations assessment (§ 1465.8), the cost of probation services, a $10 crime prevention fine, and "any other mandatory fines and fees." Appellant was advised of her right to an ability to pay hearing.

On June 27, 2018, the Legislature enacted section 1001.36, which created a pretrial diversion program for certain defendants with mental disorders. (§ 1001.36, subd. (a).) (Stats. 2018, ch. 34, § 24.)

Appellant timely appealed the May 30, 2018 order.[3]

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[2] The psychiatrist's July 2017 report also contained limited information about appellant's financial condition. Appellant stated "she receives SSI benefits." Appellant's daughter indicated her mother was homeless, but appellant denied this and maintained she has never been homeless.

[3] An appeal may be taken by the defendant "from a final judgment of conviction," and "an order granting probation . . .

DISCUSSION

I. Section 1001.36 Does Not Apply Retroactively.

Appellant contends her conviction should be conditionally reversed and the matter remanded for the trial court to determine, retroactively, whether defendant qualifies for a pretrial diversion program for defendants with qualifying mental disorders under 1001.36. Relying on *In Re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299 (*Lara*), appellant argues section 1001.36 should apply retroactively because it confers an ameliorative benefit to defendants whose judgments are not final on appeal. Respondent contends section 1001.36 is not retroactive, focusing on the express language of the statute which provides that pretrial mental health diversion is available "until adjudication." Respondent argues that, whether "adjudication" is interpreted narrowly to include the adjudication of guilt at trial, or broadly to include the rendering of judgment, appellant's claim was already "adjudicated" by the time of the statute's enactment.

A. Section 1001.36

Effective June 27, 2018, section 1001.36 authorizes *pretrial diversion* in lieu of criminal prosecution for defendants with qualifying mental disorders: " '[*P*]*retrial diversion*' means the *postponement of prosecution*, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged *until adjudication*, to allow the defendant to

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shall be deemed to be a final judgment within the meaning of this section." (§ 1237; see also *In re DeLong* (2001) 93 Cal.App.4th 562, 571 ["Although this type of probation sentence defers the pronouncement of sentence, the probation order is a final judgment for purposes of appellate review."].)

undergo mental health treatment . . . ." (§ 1001.36, subd. (c), italics added.)

A trial court may grant pretrial diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder was a significant factor in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and waives his or her speedy trial rights; (5) the defendant agrees to comply with the treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (§ 1001.36, subd. (b).)

If the trial court grants pretrial diversion, the defendant will undergo mental health treatment by an approved mental health program that will provide regular reports of the defendant's progress. Criminal proceedings may be diverted for "no longer than two years." (§ 1001.36, subds. (c)(1)(B) & (c)(2)—(3).) If the defendant performs satisfactorily in diversion, "the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion" and "the arrest upon which the diversion was based shall be deemed never to have occurred." (§ 1001.36, subd. (e).) Under certain circumstances, if the defendant commits additional crimes or performs unsatisfactorily in diversion, the court may reinstate criminal proceedings. (§ 1001.36, subd. (d).)

A stated purpose of the new law is to promote "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35.)

B. Retroactivity of Section 1001.36

Penal statutes are generally presumed to apply prospectively unless they expressly state otherwise. (§ 3.) However, under *Estrada*, " 'an amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date.' " (*People v. Weaver* (2019) 36 Cal.App.5th 1103, 1116, review granted October 9, 2019, S257049 (*Weaver*).) " 'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' " (*Lara*, *supra*, 4 Cal.5th at p. 308.) *Lara* extended retroactivity principles under *Estrada* to an amendment in the law that did not reduce punishment for a particular crime, but did reduce the possibility of punishment for a class of persons, namely, juveniles. (*Id.* at p. 308.)

The Courts of Appeal are currently divided on the question of whether section 1001.36 applies retroactively to persons who were tried, convicted, and sentenced before section 1001.36 went into effect, but as to whom judgment is not yet final. In *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted December 27, 2018, S252220 (*Frahs*), the Fourth District followed the reasoning of *Estrada* and *Lara* to hold that section 1001.36 provides an " 'ameliorating benefit' " that should be applied as broadly as possible to further the legislative purpose of increasing diversion of individuals with mental disorders. (*Frahs*, at p. 791.) Because the defendant's case was not yet final on appeal, the court found he was potentially eligible for section 1001.36 diversion, notwithstanding that his current criminal action had

"technically been 'adjudicated' in the trial court." *Frahs* reasoned that "[t]he fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate." (*Frahs*, at p. 791; see also *Weaver*, *supra*, 36 Cal.App.5th at p. 1122, rev. granted; *People v. Hughes* (2019) 39 Cal.App.5th 886, 895, review granted November 26, 2019, S258541.)

The Fifth District disagreed with *Frahs* in *People v. Craine* (2019) 35 Cal.App.5th 744 (*Craine*), review granted September 11, 2019, S256671. *Craine* held that "section 1001.36 and its legislative history contraindicate a retroactive intent with regard to defendants, like Craine, who have been found guilty of the crimes for which they were charged." (*Id.* at p. 749.) The court concluded that the statute's reference to pretrial diversion up to the point of "adjudication" referred to the "adjudication of guilt or acquittal." (*Id.* at p. 755; see also *People v. Torres* (2019) 39 Cal.App.5th 849, 855 (*Torres*) [citing *Craine*'s holding that "section 1001.36 was not intended to apply to defendants tried and convicted before the enactment of the statute"].) "At most, 'adjudication' could be synonymous with the rendition or pronouncement of judgment, which occurs at the time of sentencing." (*Craine*, at p. 755.) According to *Craine*, the intent of the Legislature was evident from the text of the statute, which uses "preadjudicative" terms to describe its benefits, such as the "postponement of prosecution," the dismissal of "criminal *charges*," and the expungement of the "*record of the arrest*." (*Id.* at pp. 755—757.) Thus, "pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced." (*Id.* at p. 756.) The intent of the

Legislature was confirmed by the legislative history, which envisioned diversion " '*at an early stage in the proceedings*,' " with a focus on reducing the number of referrals to state hospitals based on findings of incompetency to stand trial. (*Id.* at pp. 758—759, citing Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017—2018 Reg. Sess.) as amended Aug. 23, 2018, pp. 2—3; Assem. Conc. Sen. Amends. to Assem. Bill 1810 as amended June 12, 2018, item 17, p. 7).) As *Craine* observed, the purpose of a *pretrial* diversion program is precisely to " '*avoid* the necessity of a trial.' " (*Craine*, at p. 755.)

C. Analysis

In analyzing the retroactive application of section 1001.36, we apply the principles of statutory interpretation. " ' " 'As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning.' " ' [Citation.]" (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141.)

By the plain language of section 1001.36, which circumscribes the scope of its application "from the point at which the accused is charged *until adjudication*," pretrial diversion is not retroactively available to appellant, whose case had already been "adjudicated" by the time of the statute's enactment. (§ 1001.36, subd. (c), italics added.) We employ the commonsense meaning of "adjudication," that is, the adjudication of a defendant's guilt, whether based on a plea of guilt or trial on the merits. (See *Craine*, *supra*, 35 Cal.App.5th at pp. 755—756, rev. granted ["We agree with respondent's position that 'adjudication,'

which is an undefined term, is shorthand for the adjudication of guilt or acquittal."]; *People v. Clancey* (2013) 56 Cal.4th 562, 570 [" ' "guilt is adjudicated at trial or admitted by plea" ' "].) "Sentencing occurs *after* adjudication and section 1001.36, subdivision (c) provides that mental health diversion may be ordered at any point in the judicial process '*until adjudication*.' " (*Torres*, *supra*, 39 Cal.App.5th at p. 856, first italics added.) Thus, by the time appellant was sentenced to probation following a jury conviction, her case had been "adjudicated."[4] There is no re-adjudication of guilt by trial or plea following an order granting probation. A subsequent probation revocation does not "initiate a second criminal prosecution, nor is it intended to authorize criminal punishment because 'the sole consequence of revocation of probation is that the offender must commence to serve a term for an offense of which he *previously* was properly convicted.' " (*People v. McGavock* (1999) 69 Cal.App.4th 332, 337, citing *In re Coughlin* (1976) 16 Cal.3d 52, 61].) Because

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[4] When probation is imposed and the imposition of sentence suspended, the trial court retains "undisputed authority to choose from all the initially available sentencing options" if the defendant's probation is later revoked (see § 1203.2, subd. (c).) Thus, we construe an order granting probation and suspending imposition of sentence as "a form of sentencing" for purposes of this analysis. (Cf. *In re DeLong*, *supra*, 93 Cal.App.4th at pp. 570—571, citing *People v. Howard* (1997) 16 Cal.4th 1081, 1092 [observing that "an order granting probation and suspending imposition of sentence is a form of sentencing" in effectuating purpose of amendatory law]; see also Cal. Rules of Court, rule 4.405(5) [" 'Sentence choice' means the selection of any disposition of the case that does not amount to a dismissal, acquittal, or grant of a new trial."].)

appellant's case had been "adjudicated" by the time of the statute's enactment, she is precluded from the class of persons who may retroactively benefit from mental health diversion under section 1001.36.

Courts have recognized the inherent conflict in *Frahs*'s reasoning that "[t]he fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate," not a limit on its retroactivity. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, rev. granted; see, e.g., *Weaver*, *supra*, 36 Cal.App.5th at p. 1120, rev. granted ["We recognize that application of section 1001.36 to individuals who have already been convicted but whose convictions are not yet final on appeal may appear to conflict with several aspects of the provision's text."].) The term "until adjudication" is "rendered surplusage" when a case is remanded to the trial court for potential diversion after the defendant has been convicted. (*Weaver*, at p. 1120.) To reconcile this conflict, *Weaver* viewed "these portions of the statute as demonstrating the Legislature's intent that individuals who commit their crimes after the effective date of section 1001.36 and whose guilt has been adjudicated in the form of a plea of guilty or no contest or a conviction after trial are no longer eligible for pretrial diversion under the statute." (*Ibid.*) By extension, individuals who committed their crimes before the statute's effective date and whose guilt has been adjudicated would be eligible for the program. However, this interpretation concedes that "how this particular diversion program is ordinarily designed to operate" is *prospectively*—going forward "after the effective date of section 1001.36." (*Frahs*, at p. 791; *Weaver*, at p. 1120.)

Further, the language of the statute describes the implementation of the diversion program *prior to trial*, and makes no provisions for its implementation at a later time. To be eligible for diversion, the defendant must "waive[] his or her right to a speedy trial." (§ 1001.36, subd. (b).) The statute explains that prosecution will be postponed until adjudication, not judgment (§ 1001.36, subd. (c)), and discusses the implications of successful diversion on a defendant's criminal charges and record of arrest, not conviction (§ 1001.36, subds. (e)—(g).) We find no indication in the language of the statute that the Legislature contemplated a retroactive application of section 1001.36 following an adjudication of guilt. Therefore, "[i]t would be impertinent for this court to place a strained interpretation upon a statute merely to bring about a result which, in the enactment of that statute, was neither contemplated nor intended." (*People v. Borja* (1980) 110 Cal.App.3d 378, 382.) Under the unambiguous terms of section 1001.36, appellant's request for *posttrial* diversion is simply not authorized.

We find the reasoning in *Craine* persuasive, and we therefore conclude that defendants who were tried, convicted, and sentenced to probation before the adoption of section 1001.36 are not eligible for pretrial mental health diversion. Although the statute reduces the possibility of punishment for a class of persons—mentally ill defendants whose cases have not been "adjudicated"—the plain language of the statute and our understanding of the Legislature's intent compel our conclusion that appellant is not a member of this intended class.

II. Appellant has forfeited any challenge to the restitution fine and court assessments.

Appellant challenges the imposition of the $400 restitution fine and court assessments on due process grounds. Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), appellant urges us to stay execution of the restitution fine and vacate the court assessments because appellant is allegedly indigent and the trial court failed to consider whether she had the ability to pay. We disagree because the issue was forfeited.

Section 1202.4, subdivision (d) allows a court to consider a defendant's inability to pay a restitution fine if the fine is more than the minimum fine of $300. (§ 1202.4, subd. (d); *People v. Avila* (2009) 46 Cal.4th 680, 729 (*Avila*).) The statute provides that a defendant who is unable to pay more than the minimum fine must raise a challenge in the trial court: "A defendant shall bear the burden of demonstrating his or her inability to pay." (§ 1202.4, subd. (d).) Thus, to preserve the issue on appeal, appellant was obligated to object to the amount of the fine and demonstrate her inability to pay anything more than the $300 minimum in the trial court. (See *Avila*, *supra*, at p. 729.)

Dueñas is distinguishable because the court imposed the minimum restitution fine under section 1202.4, subdivision (b), and the defendant clearly advised the court of her inability to pay. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1162, 1169.) Here, the trial court did not impose the minimum restitution fine, and appellant did not object to the fine and assessments or indicate an inability to pay, as statutorily required, even after the trial court advised appellant of her right to an ability-to-pay hearing.

Appellant concedes her trial counsel failed to object to the fine and assessments, but argues there was no forfeiture because:

(1) she presents a pure question of law based on undisputed facts that can be raised for the first time on appeal; and (2) it would have been futile to object before the trial court. We are not persuaded. By claiming indigence, appellant requests a factual determination of her inability to pay based on facts respondent disputes and which the record does not conclusively establish. Further, an objection based on her inability to pay would not have been futile, especially in light of the court's advisement and under governing law which clearly contemplates such an objection. (§ 1202.4, subd. (d); see also *Avila*, *supra*, 46 Cal.4th at p. 729.) Having failed to object in the trial court based on her inability to pay, appellant has forfeited this issue as to the restitution fine and court assessments. (See *People v. Scott* (1994) 9 Cal.4th 331, 353.)

DISPOSITION

The orders of the trial court are affirmed.

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EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.